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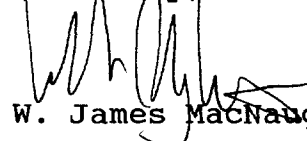
Office of the Secretary
Federal Communications Commission
1919 "M" Street, N.W.
Washington, D. C. 20554

Re: In the Matter of Implementation of
Sections 12 and 19 of the Cable Television
Consumer Protection and Competition Act of
1992 - Development of Competition and
Diversity in Video Programming
Distribution and Carriage
MM Docket No. 92-265

Dear Sirs:

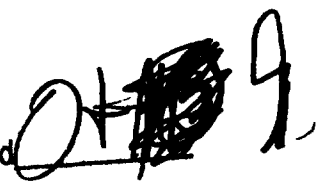
Enclosed for filing in this action please find an original and ten (10) copies of the Comments of National Satellite Programming Network, Inc. Would you please distribute a personal copy of the Comments to each Commissioner. Please mark one copy "filed" and return it to me in the enclosed envelope.

Sincerely,


W. James MacNaughton

WJM:lw
Enclosures
cc: R. L. Vogelsang

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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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of Sections 12 and 19 of the
Cable Television Consumer
Protection and Competition Act
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Development of Competition and
Diversity in Video Programming
Distribution and Carriage

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POST-PAID BY ADDRESSEE

COMMENTS OF NATIONAL SATELLITE PROGRAMMING NETWORK, INC.

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I. Introduction

1. National Satellite Programming Network, Inc. ("NSPN") submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") in this matter adopted by the Federal Communications Commission (the "Commission") on December 10, 1992 and released December 24, 1992. NSPN is an "agent or buying group" as those terms are using in Section 628(c)(2)(B).¹ In these comments, NSPN describes its role as a purchasing agent for cable programming. NSPN also proposes principles the Commission should adopt which will enable purchasing agents to facilitate the creation of a fair marketplace for the sale of programming to all multichannel video programming distributors ("MVPDs").

II. NSPN Is The Oldest and Largest Purchasing Agent in the Country

2. NSPN pioneered the concept of a purchasing agent for cable television programming beginning in 1982. At that time, a number of satellite master antenna television ("SMATV") companies were unable to purchasing premium programming from Home Box Office ("HBO") and Showtime due to the refusal of those programmers to sell their service to the SMATV industry. This boycott was instigated by the franchised cable operators who feared competition from SMATV companies. SMATV companies banded together and formed

¹ For purposes of simplicity, NSPN's status will be referred to in these comments as a "purchasing agent." However, as described in more detail below, NSPN's relationship with programmers and its customers is rarely one of "agency" in the true legal sense of the term.

a buying group then known as the National Satellite Programming Cooperative (the "Co-op"), a privately held company. The Co-op negotiated with and introduced several new premium programming services to the SMATV industry thereby breaking the programming boycott. The Co-op then went on to pioneer the introduction of literally dozens of programming services to the SMATV industry—most of which had previously refused to deal with SMATV operators.

3. The Co-op was founded on the premise that programmers will deal with and offer more favorable pricing to companies that can bring large numbers of subscribers to the service. Prior to the creation of the Co-op, large numbers of subscribers were only offered to programmers by multiple system cable operators ("MSOs"). Large MSOs have always paid lower per subscriber rates for their programming than smaller cable operators.²

4. The Co-op brought together a large number of small SMATV companies and thus created the purchasing power of a large MSO. The Co-op was the first company to use this concept. Over the last eleven years, the Co-op evolved into the largest purchasing agent in the United States for cable programming. It also changed its name to the National Satellite Programming Network.

5. NSPN currently offers fifty-nine (59) programming services (including HBO and Showtime) to over nine hundred (900)

² These rate differentials are commonly known as "volume discounts."

member companies. NSPN members range in size from five (5) subscribers to over 15,000 subscribers and, in the aggregate, pass over 1.3 million homes. NSPN members have anywhere from one (1) to one hundred eight (108) satellite receiving sites, also known as head ends. Each month, NSPN bills and collects over 1.5 million "subscriber units" (one subscriber to one programming service is one "subscriber unit"). Many NSPN members are individual co-op and condominium associations that purchase and install their own satellite dish antennas at the building and provide their own "private" cable service to building residents.

6. NSPN serves primarily SMATV and Multichannel Multipoint Distribution Service ("MMDS") systems and also some smaller cable operators. In terms of purchasing power, NSPN is the same size as a large cable MSO.³ NSPN therefore is generally able to negotiate for and receive lower prices and more favorable terms than are offered to NSPN's members if they deal directly with programmers. NSPN members, in turn, receive the benefits of the savings through reduced programming costs.

7. The purchasing agent business is highly competitive. In addition to NSPN, there are two other purchasing agents that cater primarily to SMATV companies. There is also a purchasing agent that caters only to small franchised cable operators known as the National Cable Television Cooperative. In addition, there are a number of purchasing agents that cater to the home satellite dish

³ NSPN is easily among the top fifty MSOs in the U.S. in terms of number of subscribers.

("HSD") market. The National Rural Telecommunications Cooperative is, to NSPN's knowledge, the largest of the HSD purchasing agents. SMATV customers can and do regularly "shop" for the best prices and terms among the three SMATV purchasing agents. When some customers become large enough, they deal directly with the programmers.

8. As the oldest and largest of the purchasing agents, NSPN has taken a leadership role in the SMATV and MMDS industries. An affiliate of NSPN publishes the SMATV/MMDS industry trade magazine, Private Cable and Wireless Magazine, and conducts the annual SMATV/MMDS industry trade show. NSPN has also been an active supporter of SMATV and MMDS trade associations.

9. NSPN exists because it provides economic value to both programmers and its members. All programmers have large transaction costs in dealing with their MVPD customers. The programmer spends a large amount of time and overhead—primarily salaries and rent—to sell the programming service to a customer, to maintain an ongoing relationship with the customer and to bill and collect from the customer. And a large part of this time and overhead are spent without regard to the size of the customer. In the simplest of terms—it takes as much time and overhead to make a ten minute phone call to an MSO with two million subscribers as it does to make the same phone call to a small MVPD with one hundred subscribers. Accordingly, it is much more efficient for a programmer to deal with a large MSO than with a small MVPD. Not surprisingly, many programmers offer volume discounts to large MSOs in recognition of these efficiencies.

10. NSPN has a highly trained staff based in Rosenberg, Texas. The NSPN staff takes over the corporate overhead costs of fifty-nine (59) programmers in dealing with over nine hundred (900) MVPDs. The NSPN staff can and does perform virtually all of the programmer's functions of sales, account maintenance, marketing, billing and collecting and does so more efficiently than the programmers. This efficiency is due to (1) the high level of training and low turnover of NSPN staff, (2) the ability of NSPN staff to integrate the corporate overhead functions of fifty-nine (59) programmers in dealing with each account, (3) the location of NSPN outside of the programmer centers of New York, Atlanta and Los Angeles—cities with much higher overhead and salaries than Rosenberg, Texas and (4) custom designed billing software.

11. NSPN also offers significant economic value to its members. First and foremost, NSPN offers its members the benefits of volume discounts. The members generally pay less for the same programming from NSPN than if they purchased the programming directly from the programmer.⁴

12. Some NSPN members carry as many as thirty-eight (38) programming services through NSPN. There are significant overhead costs for the member to deal directly with each of these

⁴ As a member grows and becomes more established, it too can take advantage of programmer volume discounts. Some members eventually leave NSPN and establish their own direct relationships with programmers. However, NSPN offers a "safe haven" to small and start-up companies in purchasing cable programming at competition rates. These small and start-up companies will eventually provide the competition to established cable operators expected by Congress.

programmers including participation in marketing programs, billing and collecting. As with the programmers, NSPN takes over the overhead functions for its members thereby reducing the member's costs.

13. Some programmers impose deposit or letter of credit requirements on their customers or minimum subscriber counts that many small non-cable MVPDs are unable to meet. NSPN gives its members access to that programming by giving programmers the subscriber count and fiscal responsibility the programmer requires.

14. A good example of how NSPN works is its billing and collecting. NSPN has developed highly sophisticated software that enables NSPN to bill and collect 1.5 million subscriber units each month. Each month, over nine hundred (900) members report their subscriber counts to NSPN. The members report their subscriber counts by programmer and head end site. A head end will have anywhere from one (1) to several hundred subscribers per service. NSPN then generates a single invoice to the member for all of its programming, thereby relieving the customer of the overhead expense of preparing and paying invoices for a multitude of programmers.

15. Each month, NSPN prepares a single statement for each of fifty-nine (59) programmers and pays each programmer with one check. The statement lists each member who takes the programmer's service and identifies the number of subscribers by head end site. This relieves the programmer of the overhead expense of billing and collecting for payments from over nine hundred (900) MVPDs. NSPN has also, when necessary, participated

in programmer audits of NSPN members to ensure proper reporting of subscriber numbers.

16. NSPN typically is a direct licensee of the programmer and is thus directly responsible for all programming fees. NSPN—not the programmer—absorbs bad debt. With its established reputation, NSPN provides the programmers with the financial security they want when dealing with smaller operators and newer technologies such as MMDS.

17. Another example of NSPN's benefits to programmers and members is the initiation of new service. When an NSPN member initiates service at a new head end, it typically needs to have the decoding equipment in the head end authorized or "decoded" for as many as thirty-eight (38) programmers within a relatively short period of time. NSPN has established a protocol for this process which allows the member to notify NSPN of the time and place for authorization. NSPN then arranges for the activation of decoding equipment for all of the appropriate programmers within the member's time requirements.

18. NSPN has brought a large measure of rationality and economic efficiency to a robust and sometimes chaotic market for cable programming. NSPN has accomplished this task without any government assistance and during a time when the cable programming market has been artificially skewed due to the improper practices of franchised cable operators. NSPN submits these comments to assist the Commission in formulating policies that will establish

a more true and fair marketplace for cable programming services.⁵ However, if the Commission ignores NSPN's proposals, or tries to "over-regulate" the cable programming business, it could inadvertently and irreparably damage or destroy NSPN's business and the ability of non-cable MVPDs to compete effectively.

**III. All Programming Should Be Available
To All MVPDs and Their Purchasing
Agents On a Non-Discriminatory
Basis**

19. The two biggest problems faced by non-cable MVPDs and their purchasing agents in obtaining programming are: (1) facilities-based discrimination, i.e. discrimination in prices and other terms and conditions based on whether the customer is an SMATV, MMDS or other non-cable MVPD; and (2) exclusive contracts between programmers and franchise cable operators. NSPN routinely purchases programming on the "SMATV rate card" and pays higher fees for the same programming than is paid by cable MSOs with the same number of subscribers as NSPN. NSPN provides programmers with all the benefits of a large cable MSO including one billing statement and one check. Yet NSPN pays more than a cable MSO of the same size for the same programming. This practice has to stop.

⁵ NSPN is the most complete repository of diverse data on cable programming rates, practices and related information in the country. NSPN is prepared to provide the Commission's staff with NSPN's detailed data and information concerning programming rates and practices subject to confidential treatment. This information is much too voluminous and commercially sensitive to be included in these comments.

20. NSPN concurs with and supports the comments of Liberty Cable Company, Inc. ("Liberty"), also filed in this proceeding, that facilities-based discrimination should be presumptively illegal. NSPN should have the opportunity to pay the same rates as other MSOs for the same programming. Purchasing agents should also have standing to complain to the Commission about illegal programming practices.

21. Moreover, NSPN should not be limited to "special markets." Most programmers have identified non-cable MVPDs as "special markets" and have limited NSPN to serving only "special markets." This, too, is facilities-based discrimination. Purchasing agents should have the opportunity to act as purchasing agents for all MVPDs and not just the alternative technology distributors.⁶

22. Another form of facilities-based discrimination occurs when a programmer artificially sets an excessively high subscriber count to qualify for a volume discount. Some programmers set their volume discount subscriber number so high that only the five or ten largest cable MSOs qualify for discounts. If programmers are going to employ volume discounts, they should set the "break-points" at a level that is meaningful for all MVPDs

⁶ The Commission has suggested that geographic discrimination may be justified under some circumstances. See NPRM at ¶ 11. The prohibition on anti-competitive programming practices should be nationwide without geographic exceptions. All of NSPN's fifty-nine (59) programmers charge the same rates nationwide and always have. There is no conceivable reason why any satellite delivered programming service should have any significant cost differentials to serve different areas of the country.

and purchasing agents, i.e. low enough that non-cable MVPDs and purchasing agents can take advantage of the volume discount.

23. A programmer should be free, if it so chooses, to set a minimum number of subscribers that an MVPD must have to deal directly with the programmer, provided the MVPD has the opportunity to acquire the programming from a purchasing agent. This will allow the programmer to not deal with MVPDs too small to justify the overhead expense while still allowing the MVPD to acquire the programming through a purchasing agent.

24. By the same token, the programmer should be required to deal with a purchasing agent when the MVPD so directs. NSPN members rely on NSPN to reduce their overhead costs in dealing with programmers. Programmers should not be able to thwart that desire by forcing MVPDs to deal directly with the programmer and thus increase their costs.

25. Another variation on facilities-based discrimination is the frequent and amorphous claim by programmers of "most favored nations" or "grandfathering." When NSPN learns that a cable operator is getting a more favorable rate than NSPN, the programmer will justify the discrimination by claiming that the cable operator is "grandfathered", i.e. has a previously established lower rate, or has "most favored nations", i.e. the best rate offered. NSPN never gets "grandfathered" or "most favored nations" nor do non-cable MVPDs get these benefits. Those practices should be outlawed as facilities-based discrimination.

26. Facilities-based discrimination also occurs when a cable operator is given exclusive sub-distribution rights for programming within its franchise area. Non-cable MVPDs then have to buy the programming from their cable competitor. Sometimes the cable "sub-distributor" refuses to sell programming altogether. And even if it does sell the programming, the price is invariably discriminatory and high. Non-cable MVPDs are never offered the same opportunity of exclusive sub-distribution rights. This practice should be banned as both facilities-based discrimination and an illegal exclusive arrangement.

27. Facilities-based discrimination has significantly hindered the ability of NSPN and its members to acquire and distribute programming to consumers. SMATV companies generally pay a much larger percentage of their operating expenses towards programming than do franchised cable companies with the same number of subscribers. SMATV and cable companies are functionally identical except that SMATV companies serve multifamily buildings and do not use public streets. Except for size, there is no reason why SMATV companies should pay more for the same programming than cable operators. Needless to say, the higher cost of programming puts the SMATV industry at a significant competitive disadvantage with the cable industry and has diminished the ability of the SMATV industry to reach its full potential.

IV. The Commission Should Ban Exclusive Programming Arrangements

28. NSPN also supports the abolition of exclusive programming agreements and concurs with the comments of Liberty concerning exclusivity. Some apologists for program exclusivity argue that exclusivity is necessary to promote the introduction of new programming services to the marketplace. In NSPN's experience, this claim is pure nonsense.

29. NSPN offers new programmers the immediate opportunity to obtain access to an established subscriber base the size of any large MSO with over nine hundred (900) MVPD outlets nationwide. NSPN offers precisely the same consumer access to a new programming service as that offered by any large MSO. Yet no programmer has ever offered NSPN the exclusive right to distribute its product.

30. Five years ago, exclusivity and programmers' refusals to deal were quite commonplace. But as NSPN and its membership grew, programmers realized that they could no longer afford to ignore the emergence of alternative technology competitors. Accordingly, many programmers that once boycotted the SMATV industry have now entered it with enthusiasm and great profit including all of the "major" premium services—HBO, Showtime, The Movie Channel, Playboy and Disney. Indeed, several programmers have told NSPN that non-cable MVPDs represent the fastest growing segment of their business.

31. In truth, the only rationale for exclusivity is to protect a franchised cable company from competition. Liberty's experience with Court TV is an example of that. NSPN has a contract to distribute Court TV to every SMATV operator in the country—with the sole exception of Liberty. There is no conceivable reason for why Liberty is unable to obtain Court TV other than to give its franchised cable competitor some advantage in the marketplace. Exclusivity has no place in the cable programming marketplace. It should be banned immediately.

V. The Commission Should Allow Volume Discounts, Bulk Rates, Commercial Rates and Marketing Incentive Programs

A. Volume Discounts

32. The Commission has asked for comments on whether it should outlaw volume discounts and impose a "uniform" rate structure. See NPRM at ¶ 15. NSPN strongly opposes the imposition of uniform rates by the Commission because uniform rates would eliminate NSPN and all other purchasing agents from the marketplace. NSPN members would perceive little or no value in doing business with NSPN if they could purchase the programming directly from the programmer at the same cost.⁷ If NSPN were eliminated, the small and start-up non-cable MVPDs will lose their "safe harbor" and have to struggle with the complexities and costs

⁷ Several advertiser supported programming services claim they charge a flat fee to all MVPDs regardless of size. Obviously, NSPN cannot offer its programming "at cost" to its members and still stay in business.

of providing a growing multitude of programming services on their systems.

33. Even though the "SMATV rate card" is higher than the "cable rate card," the programmers are quite competitive with each other within the SMATV rate structure. For example, HBO and Showtime each price their SMATV rate card in an effort to be competitive with the other in attracting SMATV distributors. And there is competition among and between NSPN and other purchasing agents to acquire HBO and Showtime programming for their respective customers. Between the competitive pressures of programmers, purchasing agents and the MVPDs who chose to deal directly with the programmers, a free "SMATV" market price is generally agreed upon. However, this whole process takes place within the artificial constraint of facilities-based discrimination in the form of the "SMATV rate card."

34. HBO, Showtime and indeed all the programmers appear to be quite competitive with each other in the regular "cable rate" market.⁸ If the artificial distinction between "cable" and "special markets" is eliminated, then all programmers will presumably compete with each other for access to the channels offered by all MVPDs and overall competition should increase. Subscriber count is (or should be) the "Holy Grail" of the programming business—both for premium and advertiser supported

⁸ There may be some exceptions where vertically-integrated cable operator/programmers provide programming to themselves at or near cost. This practice is the same as artificially high volume discounts and should be banned as facilities-based discrimination.

services. If programmers are given the opportunity to pursue subscriber counts without the unfair constraints imposed by cable companies, i.e. facilities-based discrimination and exclusivity, NSPN believes the cable programming marketplace can and will work effectively to set prices and other terms and conditions.

35. The Commission should outlaw facilities-based discrimination and exclusivity and then step back and see if the programming marketplace will become truly competitive. The Commission should monitor the industry and make clear that it will intervene if unfair programming practices continue. Monitoring should take the form of requiring all programmers to file with the Commission and publish their standard contract, "facilities-neutral" rates and relevant marketing policies.

B. Bulk Rates

36. There are several practices in marketing cable programming that have been beneficial to non-cable MVPDs, programmers and consumers and should be allowed to continue in a "facilities-neutral" manner. One such practice is the "bulk rate"—a discount if all residents of a building receive the programmer's service. Bulk rates are strong incentives for MVPDs to promote a programmer's service and they benefit consumers with reduced pricing. This practice should be allowed to continue.

C. Marketing Incentive Programs

37. Another beneficial practice is marketing incentive programs in which programmers offer their distributor's discounts if they increase subscriber counts within a set period of time. Like bulk rates, incentive programs encourage MVPDs to promote the programmer's service. NSPN frequently coordinates the marketing incentive programs of several programmers at the same time, thus combining and maximizing the impact of the incentive programs. NSPN has found that coordinating multiple marketing incentive programs has been very beneficial to the growth of small and start-up SMATV companies.⁹

D. Commercial Rates

38. There is also a segment of the market known as "commercial" accounts. These are "non-residential" subscribers, such as hotels/motels, prisons, hospitals, universities, bars, country clubs, firehouses and the like. Due to the difficulty in accurately determining who is actually watching the service, the programmers typically charge a different rate for these "commercial" accounts than for "residential" subscribers. This differential reflects real market costs to the programmer and should be allowed to continue so long as the "commercial" rates are "facilities-neutral."

⁹ However, programmers offer much more generous marketing incentives programs to large MSOs than to NSPN. This disparity is implicit facilities-based discrimination and should be outlawed.

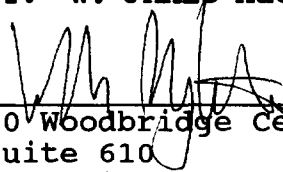
VI. Conclusion

39. Due to its longevity and leading market position as a purchasing agent, NSPN probably has more experience than any other MVPD, programmer or purchasing agent in the country on the intricacies and details of the purchase and sale of cable television programming by and to SMATV, MMDS and cable companies. NSPN strongly urges the Commission to abolish all facilities-based discrimination and exclusive arrangements. These practices have been a major impediment to the ability of non-cable MVPDs to compete in the marketplace. Once these practices are banned, the programming marketplace itself—without substantial government intervention—should be able to set the pricing and other terms and conditions based on competitive forces and the ability to each MVPD to deliver subscribers. The Commission should not interfere further with the market nor should it impose arbitrary rules such as "uniform" pricing. Instead, the Commission should encourage the process by allowing "facilities-neutral" volume discounts bulk rates, commercial rates, marketing incentive programs and other non-discriminatory practices which will allow all MVPDs and their purchasing agents to sell programming to the public. However, the Commission should monitor the programming industry and intervene if unfair programming practices continue. Programmers should be required to publish their standard contract, rate card and relevant marketing policies so that all MVPDs and purchasing agents know the "ground rules" and can guard against unfair practices.

Respectfully submitted,

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